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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**CISCO'S OPPOSITION TO ARISTA'S
MOTION IN LIMINE NO. 5 TO
EXCLUDE EVIDENCE AND
ARGUMENT REGARDING
DOCUMENTS LABELED AS
CONFIDENTIAL TO CISCO**

Date: November 3, 2016
Time: TBD
Dept: Courtroom 3 - 5th Floor
Judge: Hon. Beth Labson Freeman

1 Plaintiff Cisco Systems, Inc. (“Cisco”) hereby respectfully opposes Defendant Arista
 2 Networks, Inc.’s (“Arista”) Motion *in Limine* No. 5 (Dkt. 527, “Arista’s MIL No. 5” or “MIL 5”).
 3 All referenced exhibits are attached to the Declaration of John M. Neukom in Support of Cisco’s
 4 Opposition to Arista’s Motions *in Limine*, filed herewith.

5 **I. INTRODUCTION**

6 The Court should deny Arista’s MIL No. 5, which seeks to prevent Cisco from presenting
 7 evidence or argument regarding Arista’s possession of Cisco’s confidential documents. During
 8 discovery, Arista produced a large number of such documents that Arista should not have had in
 9 its possession. These documents are clearly branded as “Cisco Confidential” or “Cisco Company
 10 Confidential” or have other similar and prominent marks proclaiming that the document contains
 11 confidential Cisco information. [REDACTED]
 12 [REDACTED]. Arista’s
 13 possession of Cisco’s confidential documents is directly relevant to and probative of Cisco’s claim
 14 that Arista engaged in willful misconduct warranting enhanced damages for patent infringement.
 15 Arista cannot broadly exclude a swath of evidence by alleging generally that such documents
 16 “may have been obtained” through proper means. As discussed below, Arista may make
 17 individualized objections at trial to any exhibits that it believes were properly obtained rather than
 18 to call for a blanket exclusion of relevant evidence that directly relates to the issues at trial.

19 **II. FACTUAL BACKGROUND**

20 Arista admits (MIL 5 at 2) that it is in possession of a large number of documents that are
 21 marked as being confidential to Cisco. [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

[REDACTED]

III. ARGUMENT

A. **Arista's Possession Of Cisco's Confidential Information Is Relevant To Cisco's Claim Of Willfulness**

A district court may increase damages for patent infringement up to three times following a finding of willful misconduct by the infringer. 35 U.S.C. §284; *Finjan, Inc. v. Blue Coat Sys.*, 13-cv-03999-BLF, 2016 U.S. Dist. LEXIS 93267, at *46 (N.D. Cal. July 18, 2016). The Supreme Court has made clear that subjective willfulness and in particular "egregious misconduct" may warrant enhanced damages for patent infringement regardless of any objective reasonableness that may appear after the fact, holding that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 (2016).

[REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]

5 In determining whether an infringer engaged in “egregious misconduct” under *Halo*, this
 6 Court recently looked to the eight factors set out by the Federal Circuit in *Read Corp. v. Portec,*
 7 *Inc.*, 970 F. 2d 816 (Fed. Cir. 1992), as a guidepost.

8 The *Read* factors include: (1) ***whether the infringer deliberately***
 9 ***copied the ideas or design of another***; (2) whether the infringer,
 10 when he knew of the other's patent protection, investigated the
 11 scope of the patent and formed a good-faith belief that it was
 12 invalid or that it was not infringed; (3) the infringer's behavior as a
 13 party to the litigation; (4) defendant's size and financial condition;
 14 (5) closeness of the case; (6) ***duration of defendant's misconduct***;
 15 (7) remedial action by the defendant; (8) ***defendant's motivation***
 16 ***for harm.***

17 See *Finjan, Inc.*, 2016 U.S. Dist. LEXIS 93267, at *47-48 (emphasis added).

18 [REDACTED], is evidence that is relevant and probative with respect to
 19 at least *Read* factors 1, 6, and 8. Therefore, evidence and argument concerning Arista's
 20 possession of Cisco's confidential documents should not be excluded from trial.

21 **B. Arista Will Not Be Improperly Prejudiced By Evidence That [REDACTED]**
 22 **Had Possession Of Cisco's Confidential Documents**

23 Arista suggests (MIL 5 at 3-4) that it would be unduly burdened by having to explain
 24 through its witnesses and Cisco's witnesses that documents within its possession that are marked
 25 “Cisco Confidential” ***might have been obtained*** from publicly available Internet sources or “given
 26 to Arista by customers under no obligation to keep them confidential.” But Arista has not
 27 identified any specific documents marked as “Cisco Confidential” that are actually publicly
 28 available. Arista's claim of prejudice thus amounts to rank speculation that cannot justify a broad
 generic exclusion of such evidence. See *Weiss v. La Suisse, Societe D'Assurances Sur La Vie*, 293
 F. Supp. 2d 397, 407-08 (S.D.N.Y. 2003) (motion to exclude “all evidence regarding other policy
 holders” lacked the requisite specificity where “[n]o particular documents or testimony have been

identified”). And since Cisco does not intend to question Arista about how it came into possession of documents that are part of the public domain, it would be more appropriate for Arista to make individualized objections at trial to any exhibits that it believes are part of the public domain rather than to call for a blanket exclusion of a set of as yet unidentified documents.

Arista’s motion is likewise flawed in asserting (MIL 5 at 3) that Arista would be unfairly tarnished and prejudiced by evidence or argument that it had improper possession of Cisco’s confidential documents. Two of the cases that Arista cites (MIL 5 at 3) hold that evidence of a **prior and unrelated** bad act may be unduly prejudicial. *See Old Chief v. United States*, 519 U.S. 172 (1997) (in a criminal case charging the defendant as a felon in possession of a firearm, it was prejudicial to provide details of the defendant’s prior crime to prove he was a felon); *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1334-1335 (9th Cir. Or. 1985) (evidence that a birth control device manufacturer had previously lied about pregnancy rates was more prejudicial than probative in a case regarding the safety of those devices). The only other case cited by Arista found that, where a defendant was charged with smuggling aliens, evidence that two of the people being smuggled had suffered heat stroke was more prejudicial than probative because the evidence did not go to “an element of the charge.” *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir.2005) (ultimately determining that the error was harmless).

In sharp contrast to those cases, Arista’s acquisition and use of Cisco’s confidential documents is not a prior and unrelated act, nor is it unrelated to Cisco’s willfulness claim. Arista’s possession of these documents, [REDACTED] and [REDACTED] therefore is properly admitted in connection with Cisco’s of entitlement to enhanced damages for patent infringement.

IV. CONCLUSION

For the foregoing reasons, Cisco respectfully requests that the Court deny Arista’s MIL No. 5.

Dated: October 7, 2016

Respectfully submitted,

/s/ John M. Neukom

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